

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAM TAVAKE, et al.,

Plaintiffs,

v.

ALAMEDA COUNTY BOARD OF
SUPERVISORS, et al.,

Defendants.

No. C 05-0744 PJH

**ORDER RE MOTIONS TO DISMISS
AND TO STRIKE FIRST AMENDED
COMPLAINT**

Before this court are the motions to dismiss and to strike filed by defendants Alameda County Board of Supervisors, Tona Henninger, Barbara Bowman, and Chris Carmine (collectively, "Alameda County defendants"), and defendants Arthur and Rebecca Durazo. Having read the papers and carefully considered the relevant legal authority, the court rules as follows.¹

BACKGROUND

Pro per plaintiffs Sam and Tami Tavake have sued the defendants for violating their constitutional rights in connection with various searches made of their ranch for zoning violations.

Previously, this court granted leave to amend only to state Fourth Amendment claims as to defendants Alameda County, Henninger, and Bowman based on the August 20, 2004 search only; Fourteenth Amendment equal protection claims as to Alameda County, and § 1983 claims against the Durazos. All other claims were to be dismissed (including the claims against Alameda County for denying their conditional use permit, time-barred claims under

¹ Pursuant to Civ. L. R. 7-13, this order shall not be cited except as provided by Civ. L. R. 3-4(e).

the Fourth Amendment, the substantive due process claims, and conspiracy claims against the Durazos, among others). June 17 Order at 12.

The Tavakes have now filed their first amended complaint (“FAC”), in which they claim that they have been discriminated against because of their inter-ethnic relationship (Sam Tavake is Tongan/Samoan and Tami is Caucasian), and because they rent to Latino tenants. The Tavakes rename previously-dismissed defendant Chris Carmine as a defendant in the FAC, claiming that Carmine ordered the August 20, 2004 search.

The Tavakes number their claims in accordance with the numbering in their previous complaint. They thus reallege in the “second” cause of action their Fourth Amendment claims against the Alameda County defendants, claiming that the search was illegal and that it was racially motivated.² The Tavakes next claim in the “third” cause of action that they were discriminated against on the basis of their interracial relationship by Alameda County, allege that Alameda County is liable for the actions of its employees in the “fourth” cause of action, and replead a conspiracy cause of action in the “fifth” cause of action against all defendants, including the Durazos. The Tavakes also add a cause of action for fraud as the “seventh” cause of action, claiming that Henninger, Bowman, Carmine, and the Durazos fraudulently concealed information from the Alameda County Board of Supervisors about manure being dumped in a creek near their house. The “tenth” cause of action alleges that Alameda County is liable for the actions of its employees for the constitutional violations.

The Alameda County defendants and the Durazos move to dismiss and to strike.

DISCUSSION

A. Legal Standards

1. Motion to Strike

A motion to strike is brought under Fed. R. Civ. P. 12(f), and may be used to remove insufficient defenses as well as “redundant, immaterial, impertinent, or scandalous matter” that

² The FAC does not number their causes of action consecutively. For convenience, the court will refer to each claim by the number used in the FAC.

1 might otherwise prejudice a party. See also, e.g., Fantasy, Inc. v. Fogerty, 984 F.2d 1524,
2 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994).

3 2. Motion to Dismiss

4 A court should dismiss a claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim
5 only where it appears beyond doubt that the plaintiff can prove no set of facts in support of the
6 claim which would entitle the plaintiff to relief. See, e.g., Broam v. Brogan, 320 F.3d 1023,
7 1033 (9th Cir. 2003) (citations omitted). In evaluating a motion to dismiss, all allegations of
8 material fact are taken as true and construed in the light most favorable to the nonmoving
9 party. See, e.g., Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir.
10 2000) (citations omitted).

11 B. Motion to Strike

12 1. Incorporation by Reference

13 The Alameda County defendants first object to the Tavakes' attempts in the FAC to
14 incorporate by reference allegations previously stated in their original complaint, on the
15 grounds that many elements of those previous allegations were subsequently dismissed by
16 the court. See FAC at 4:26-27, 5:25-27, 6:12-13, 7:2-3, 17-18, 25-26. The Alameda County
17 defendants request that the court strike from the FAC any references to allegations in the
18 original complaint that refer to matters that were previously dismissed.

19 Under the "law of the case" doctrine, the Tavakes are bound by the court's previous
20 orders. Old Person v. Brown, 312 F.3d 1036, 1039 (9th Cir. 2002), cert. denied, 540 U.S.
21 1016 (2003). They cannot simply reincorporate allegations made in their previous complaint
22 that have already been dismissed. Thus, all the previously-dismissed claims that the Tavakes
23 attempt to reassert by reincorporation in the FAC are stricken. This includes, for example, all
24 claims that were previously dismissed under the statute of limitations, all claims against
25 individual defendants who were previously dismissed and not realleged as defendants in the
26 FAC, and all claims based on searches of the Tavake Ranch to which the court has already
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1 found the Tavakes had consented (for example, the January 2005 search), among others.³

2 2. Previous Admissions

3 The Tavakes are also bound by the previous admissions they have made in this case.
4 Sicor Limited v. Cetus Corporation, 51 F.3d 848, 859-60 (9th Cir. 1995). At the last hearing,
5 the Tavakes stated in open court in response to direct questioning by the court that their
6 complaint against the Durazos was based solely on the Durazos' alleged personal animosity
7 towards them. Accordingly, the Tavakes may not now allege that the Durazos' actions were
8 racially-motivated, and all such allegations are stricken from the FAC as well.

9 In their reply brief, the Alameda County defendants raise the similar argument that the
10 allegations that they discriminated against the Tavakes on the basis of race should be
11 stricken as well, since the Tavakes previously stated in the original complaint that the
12 Alameda County defendants had discriminated against them on the basis of the location of
13 the Tavake Ranch. However, because the court granted the Tavakes leave to explain the
14 reasons for their allegations that the Alameda County defendants had no rational basis to
15 discriminate against them, and because the Tavakes never explicitly stated in open court that
16 the location of their property was the only basis for the discrimination claim against the
17 Alameda County defendants, the court declines to strike these allegations as to the claims
18 against the Alameda County defendants.

19 3. Duplicative Claims

20 Finally, the Alameda County defendants argue that the "tenth" cause of action should be
21 stricken because it is entirely duplicative of the "third" cause of action. The Alameda County
22 defendants are correct, and the "tenth" cause of action is stricken.

23 C. Motions to Dismiss

24 The Alameda County defendants move to dismiss the "seventh" cause of action only.

25 ³ Because incorporation by reference often creates confusing situations such as
26 these, where parties are not sure what allegations are at issue in the new complaint, incorporation
27 of previous complaints by reference is not permitted in this court. Civ. L. R. 10-1. However,
28 because the Tavakes are proceeding pro per, the court will not require that the Tavakes file a
second amended complaint to correct this error.

1 The Durazos move to dismiss all claims pending against them.

2 1. "Second" Cause of Action

3 The Durazos request clarification as to whether this cause of action has been pled
4 against them. In reviewing the FAC, the court finds that the Tavakes have only asserted this
5 cause of action against the Alameda County defendants and not against the Durazos.

6 2. "Fifth" Cause of Action

7 The Durazos, however, claim that the Tavakes may not allege this claim against them,
8 because the § 1985(3) claim was previously dismissed with prejudice as to them. June 17
9 Order at 10. This is correct. The "fifth" cause of action is dismissed, again with prejudice, as
10 to the Durazos.

11 3. "Seventh" Cause of Action

12 In the "seventh" cause of action, the Tavakes attempt to state a claim for fraud on behalf
13 of the Alameda County Board of Supervisors, claiming that defendants Henninger, Bowman,
14 and Carmine defrauded the Board by failing to disclose that the Tavakes' neighbors were
15 dumping manure into a creek. All defendants move to dismiss this claim.

16 The defendants are correct that the Tavakes do not have standing to pursue a fraud
17 claim on behalf of third party Alameda County. See, e.g., Coalition of Clergy, Lawyers, and
18 Professors v. Bush, 310 F.3d 1152, 1163 (9th Cir. 2002), cert. denied, 538 U.S. 1031 (2003).
19 The fraud claim is thus DISMISSED with prejudice against all parties.

20 D. Conclusion

21 The motions to strike are thus GRANTED as to the Durazos and GRANTED IN PART
22 and DENIED IN PART as to the Alameda County defendants. The motions to dismiss are
23 GRANTED as to both the Durazos and the Alameda County defendants

24 All the claims against the Durazos in the FAC are now dismissed with prejudice. The
25 case against the Durazos is thus concluded, and they may request that judgment be entered in
26 their favor pursuant to Fed. R. Civ. P. 54(b).

27 The only parties that remain in the lawsuit are the Alameda County defendants. As for
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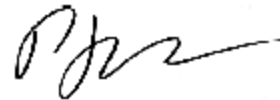
1 them, the "seventh" and "tenth" causes of action in the FAC are dismissed with prejudice, and
2 all allegations incorporated by reference from the original complaint that refer to previously-
3 adjudicated issues in this litigation are stricken. The following causes of action remain at
4 issue: the "second" cause of action against defendants Henninger, Bowman and Carmine for
5 violations of the Fourth and Fifth Amendment; the "third" and "fourth" causes of action against
6 Alameda County for violations of the Tavakes' Fourteenth Amendment equal protection rights,
7 and the "fifth" cause of action against Bowman, Henninger, and Carmine for conspiracy.

8 No further amended complaints shall be filed. The Alameda County defendants shall
9 prepare their response to the FAC within 30 days of the filing of this order, and in a manner
10 consistent with this court's previous rulings. A case management conference is scheduled for
11 October 27, 2005 at 2:30 p.m.

12 This order fully adjudicates the matters listed at nos. 51 and 60 on the clerk's docket for
13 this case.

14 **IT IS SO ORDERED.**

15 Dated: September 20, 2005



16 PHYLLIS J. HAMILTON
17 United States District Judge
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